

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

KEVIN MICHAEL BRAUSS,

Petitioner,

v.

BILL GORE, San Diego County Sheriff,  
Respondent.

Civil      15cv0944-GPC (NLS)  
No.

**ORDER DENYING MOTION TO  
PROCEED IN FORMA PAUPERIS  
AND DISMISSING CASE  
WITHOUT PREJUDICE**

Petitioner, a pre-trial detainee proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, along with a motion to proceed in forma pauperis. Petitioner requests the Court intervene in ongoing state court criminal and/or civil commitment proceedings, and complains of conditions of confinement in the San Diego County Jail. (Pet. at 2-4.) The Petition is subject to dismissal because Petitioner has not satisfied the filing fee requirement, has failed to allege exhaustion of state court remedies, has included claims which are not cognizable on federal habeas, and on abstention grounds.

**MOTION TO PROCEED IN FORMA PAUPERIS**

The request to proceed in forma pauperis is denied because Petitioner has not provided the Court with sufficient information to determine his financial status. A

1 request to proceed in forma pauperis must include a certificate from the warden or other  
 2 appropriate officer showing the amount of money or securities Petitioner has on account  
 3 in the institution where he is confined. Rule 3(a)(2), 28 U.S.C. foll. § 2254; Local Rule  
 4 3.2. Petitioner has failed to provide the Court with the required Certificate.

### 5 **FAILURE TO EXHAUST STATE COURT REMEDIES**

6 Habeas petitioners who wish to challenge either their conviction or the length of  
 7 their confinement, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);  
 8 Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a  
 9 California state prisoner must present the California Supreme Court with a fair  
 10 opportunity to rule on the merits of every issue raised in his or her federal habeas  
 11 petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly  
 12 exhaust state court remedies a petitioner must allege, in state court, how one or more of  
 13 his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513  
 14 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct  
 15 alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that  
 16 the prisoners are asserting claims under the United States Constitution.” Id. at 365-66  
 17 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an  
 18 evidentiary ruling at a state court trial denied him [or her] the due process of law  
 19 guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal  
 20 court, but in state court.” Id. at 366 (emphasis added).

21 Petitioner indicates that he has not exhausted state court remedies because: “The  
 22 too big to fail banks have turned the justice system upside down . . . the state courts are  
 23 broken and corrupt . . . [and] there is no justice or even a resemblance of due process in  
 24 the state courts.” (See Pet. at 7.) The burden of proving that a claim has been exhausted  
 25 lies with the petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981); see  
 26 also O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (holding that the exhaustion  
 27 doctrine is designed to give state court the first opportunity to pass upon alleged  
 28 violations of state prisoner’s federal rights); Hendricks v. Zenon, 993 F.2d 664, 672 (9th

1 Cir. 1993) (recognizing that the exhaustion doctrine is essentially a matter of federalism  
 2 and comity which can be excused only “in rare cases where exceptional circumstances  
 3 of peculiar urgency are shown to exist.”), quoting Granberry, 481 U.S. at 134; see also  
 4 28 U.S.C. § 2254(b) (“An application for a writ of habeas corpus on behalf of a person  
 5 in custody pursuant to the judgment of a State court shall not be granted unless it appears  
 6 that - (A) the applicant has exhausted the remedies available in the courts of the State;  
 7 or (B)(i) there is an absence of available State corrective process; or (ii) circumstances  
 8 exist that render such process ineffective to protect the rights of the applicant.”)

9 Petitioner has not alleged sufficient facts to demonstrate there is an absence of  
 10 state corrective process available to him. He has therefore failed to allege exhaustion as  
 11 to the claims presented in the Petition, and it is subject to dismissal. See Rasberry v.  
 12 Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (“Once a district court determines that a  
 13 habeas petition contains only unexhausted claims, it need not inquire further into the  
 14 petitioner’s intentions. Instead, it may simply dismiss the habeas petition for failure to  
 15 exhaust.”), citing Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001).

### 16 ABSTENTION

17 To the extent Petitioner is challenging ongoing state criminal or civil commitment  
 18 proceedings, this Court is barred from consideration of the claims by the abstention  
 19 doctrine announced in Younger v. Harris, 401 U.S. 37 (1971). Under Younger, federal  
 20 courts may not interfere with ongoing state criminal proceedings absent extraordinary  
 21 circumstances. Id. at 45-46; see Middlesex County Ethics Comm. v. Garden State Bar  
 22 Ass’n, 457 U.S. 423, 431 (1982) (stating that Younger “espouse[d] a strong federal  
 23 policy against federal-court interference with pending state judicial proceedings.”); see  
 24 Sherwood v. Tompkins, 716 F.2d 632, 634 (9th Cir. 1983) (holding that the concerns of  
 25 Younger abstention are particularly important in the federal habeas context where a state  
 26 prisoner’s conviction may be reversed on appeal, thereby rendering the federal issue  
 27 moot.)

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Absent extraordinary circumstances, abstention under Younger is required when: (1) state judicial proceedings are ongoing; (2) the state proceedings involve important state interests; and (3) the state proceedings afford an adequate opportunity to raise the federal issues. Columbia Basin Apartment Ass'n v. City of Pasco, 268 F.3d 791, 799 (9th Cir. 2001). All three of these criteria are satisfied here. Petitioner's state case is still ongoing, there is no question that the state criminal and civil commitment proceedings involve important state interests, and Petitioner has not shown that he is unable to petition the state courts for relief. Because Petitioner has not shown extraordinary circumstances, to the extent he is seeking intervention in his ongoing state proceedings, abstention is required. See Drury v. Cox, 457 F.2d 764, 764-65 (9th Cir. 1972) ("[O]nly in the most unusual circumstances is a defendant entitled to have federal interposition by way of injunction or habeas corpus until after the jury comes in, judgment has been appealed from that the case concluded in the state courts.")

#### **CONDITIONS OF CONFINEMENT CLAIMS**

To the extent Petitioner intended to present claims challenging current or past conditions of confinement (see Pet. at 4), such claims are not cognizable on federal habeas. Challenges to the fact or duration of confinement are brought by petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254; challenges to conditions of confinement are brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. See Preiser, 411 U.S. at 488-500. When a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Id. at 500. On the other hand, a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his confinement, but not to the fact or length of his custody. Id. at 499; Ramirez v. Galaza, 334 F.3d 850, 859 (9th Cir. 2003) ("habeas jurisdiction is absent, and a § 1983 action proper, where a successful challenge to a prison condition will not necessarily shorten the prisoner's sentence.") To the extent Petitioner intended to

1 present claims challenging the conditions of his confinement, but not the fact or length  
2 of his custody, such a claims are not cognizable in a habeas action pursuant to § 2254.

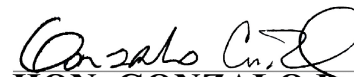
3 Rule 4 of the Rules Governing Section 2254 Cases provides for summary  
4 dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any  
5 exhibits annexed to it that the petitioner is not entitled to relief in the district court.”  
6 Rule 4, 28 U.S.C. foll. § 2254. Here, it is plain from the Petition that Petitioner is not  
7 presently entitled to federal habeas relief because he has not satisfied the filing fee  
8 requirement and has not alleged exhaustion of state court remedies, and on abstention  
9 grounds.

### 10 **CONCLUSION**

11 Based on the foregoing, the Court **DENIES** Petitioner’s motion to proceed in  
12 forma pauperis and **DISMISSES** the case due to Petitioner’s failure to satisfy the filing  
13 fee requirement, failure allege exhaustion of state court remedies, and on abstention  
14 grounds. The dismissal is without prejudice. If Petitioner wishes to challenge the fact  
15 or duration of his confinement, he must, **no later than June 16, 2014** satisfy the filing  
16 fee requirement and file a First Amended Petition which cures the defects of habeas  
17 pleading identified in this Order. If he wishes to challenge the conditions of his  
18 confinement, he may file a new civil complaint pursuant to 42 U.S.C. § 1983 which will  
19 be given a new civil case number. The Clerk of Court shall send Petitioner a blank  
20 Southern District of California amended habeas petition form, a blank Southern District  
21 of California 42 U.S.C. § 1983 Civil Complaint form, and a blank Southern District of  
22 California in forma pauperis application, along with a copy of this Order.

23 **IT IS SO ORDERED.**

24 **DATED: May 13, 2015**

25   
26 **HON. GONZALO P. CURIEL**  
27 **United States District Judge**  
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